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United States Senate

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VIA ELECTRONIC FILING AND U.S. MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

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Madame Secretary,

I would like to submit the enclosed report, "Localism: Statutes and Rules Affecting Local Programming on Broadcast, Cable and Satellite Television," prepared by the Congressional Research Service (CRS) for the Federal Communications Commission's (FCC) careful consideration in the pending Localism Proceeding.

The Report documents that millions of television households in New Jersey and several other states have little or no access to broadcast television stations that serve the local needs and interests of the viewing community. While current FCC rules impose an explicit public interest obligation on broadcast licensees to serve the interests of viewers within the city of license, these rules are not enforced. Even worse, for viewers who are beyond the borders of the city of licensee, there are no explicit obligations for broadcasters to serve their local interests whatsoever.

In the absence of clear public interest obligations to serve the local interests of viewers who reside either within or outside a broadcaster's city of license, localism—the airing of programming that is responsive to the interests and needs of local communities—cannot be achieved.

I urge the Commission to consider the findings contained in this CRS Report.

Sincerely,

Frank R. Lautenberg

cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein

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CRS Report for Congress

"Localism": Statutes and Rules Affecting Local Programming on Broadcast, Cable, and Satellite Television

October 21, 2004

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Specialist in Industrial Organization and Telecommunications Policy
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**Prepared for Members and
Committees of Congress**



"Localism": Statutes and Rules Affecting Local Programming on Broadcast, Cable, and Satellite Television

Summary

Most broadcast television stations' viewing areas extend far beyond the borders of their city of license, and in many cases extend beyond state borders. Under existing FCC rules, which are intended to foster "localism", the licensee's explicit public interest obligation is limited to serving the needs and interests of viewers within the city of license. Yet, in many cases, the population residing in the city of license is only a small proportion of the total population receiving the station's signal. Hundreds of thousands of television households in New Jersey (outside New York City and Philadelphia), Delaware (outside Philadelphia), western Connecticut (outside New York City), New Hampshire (outside Boston), Kansas (outside Kansas City, Missouri), Indiana (outside Chicago), Illinois (outside St. Louis), and Kentucky (outside Cincinnati) have little or no access to broadcast television stations with city of license in their own state. The same holds true for several rural states -- including Idaho, Arkansas, and especially Wyoming, where 54.55% of television households are located in television markets outside the state. Although market forces often provide broadcasters the incentive to be responsive to their entire serving area, that is not always the case. This report provides, for each state, detailed county-by-county data on the percentage of television households located in television markets outside the state and whether there are any in-state stations serving those households.

The Nielsen Designated Market Areas ("DMAs") also often extend beyond state borders. Local cable operators are required to carry the broadcast signals of television stations located in their DMA. If they are located in a DMA for which the primary city is in another state, and most or all of the television stations in that DMA have city of license in the other state, then the broadcast television signals they must carry will be primarily or entirely from out of state. In some cases, they may not be allowed to carry signals from within the state but outside the DMA to provide news or sports programming of special interest in their state because of network non-duplication, syndicated exclusivity, or sports programming blackout rules or because of private network affiliation contract agreements, or may be discouraged to do so because these signals do not qualify for the royalty-free permanent compulsory copyright license for local broadcast signals.

Satellite television operators are permitted (not required) to offer subscribers local television signals. Where they do provide this "local-into-local" service, they are explicitly restricted by law to the provision of the signals of those broadcast television stations with city of license within the DMA in which the subscriber is located. Except in specific atypical circumstances, satellite operators are prohibited from offering a subscriber the signals of a broadcaster that is located in the subscriber's state but outside the subscriber's DMA. H.R. 4501, S. 2013, and S. 2644 include provisions that would expand the broadcast television signals that subscribers can receive as part of local-into-local service.

This report will be updated as events warrant.

Contents

Introduction	1
Broadcast Television	4
Cable Television	10
"Must carry" rules	10
Other federal rules and laws	12
Flexibility in the rules	14
The digital transition and local programming	14
Local franchise requirements	15
Summary of factors affecting local programming on cable	15
Satellite Television	17
Issues for Congress	20
Broadcaster Obligations Within the City of License	20
Broadcaster Obligations Beyond the City of License	22
Broadcaster Obligations and Multicasting	23
Increasing the Flexibility of Cable Carriage Rules	24
Increasing the Flexibility of Satellite Local-into-Local Programming	25

List of Figures

Figure 1. Broadcast Television Station City of License and Signal Reach	6
Figure 2. A Cable System Located in a DMA in Which the Primary City is in Another State.	16
Figure 3. Satellite Subscriber Whose Local Broadcast Television Stations, as Defined by the DMA, Are in a Different State	19
Figure 4. Broadcast Station Whose City of License is an Outlying City to a Major City, but Whose Signal Covers the Major City	21

List of Tables

Table 1: Television Households in Each State That Are Located in Designated Market Areas (DMAs) for Which the Primary City is Outside the State ..	28
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"Localism": Statutes and Rules Affecting Local Programming on Broadcast, Cable, and Satellite Television

Introduction

Many Members of Congress receive complaints from constituents that the news, information, and even entertainment television programming available to them does not address the needs and interests of their local community. These constituents question, for example, why they cannot receive local news programming that focuses on the issues of importance in their locality or state or the football games of their state university.

Sometimes desired programming cannot be provided because of private contractual network affiliation agreements between broadcast networks and local broadcast station affiliates. But at other times desired programming cannot be provided because the geographic boundaries of broadcast signal contours, audience viewing patterns, and governmental jurisdictions do not conform with one another; as a result, no methodology for allocating broadcast spectrum or for constructing rules about which viewers a broadcaster's programming must serve or which signals cable and satellite operators must or may carry will meet the needs of all viewers or communities.

For example, millions of U.S. television households are located in the same metropolitan area as a major city, but across state lines from that city. Some of those households will have a stronger affinity for programming that focuses on issues relevant to the major city; others will have a stronger affinity for programming that focuses on relevant state issues. Using either metropolitan area hubs or state borders as the basis for determining the programming obligations of stations whose signals reach beyond city borders and state borders will inevitably disappoint some households. With or without government intervention, it is inevitable that some viewers and some communities will feel their needs and interests are not being met. At the same time, it may be possible to make the existing statutes and rules that affect the television programming available to consumers more flexible in order to foster the provision of television programming that better meets the needs of local communities. The purpose of this report is to explain how existing statutes and rules affect the television programming available to consumers and to discuss potential ways to foster the provision of television programming that better meets the needs of local communities.

Each broadcast television license is assigned a community of license, in the form of a specific city. Most broadcast television stations' viewing areas extend far

beyond the borders of their city of license, and in many cases extend beyond state borders.

The local broadcast television stations that each cable system must carry are determined by the Nielsen Designated Market Area ("DMA") in which the cable system is located. In the 1992 Cable Act, Congress amended the 1934 Communications Act to require, subject to certain exceptions, each cable system to carry the signals of all the local full power commercial television stations "within the same television market as the cable system," with that market determined by "commercial publications which delineate television markets based on viewing patterns."¹

The DMAs represent the only nationwide commercial mapping of television audience viewing patterns. Each county in the United States is assigned to a television market based on the viewing habits of the residents in the county.² Since viewing patterns are more closely aligned with the economic markets in which households participate than with state boundaries, some counties are assigned to DMAs for which the primary city is in a different state. In a DMA that straddles two states, with the major city and most of the broadcast stations located in one state, the cable systems in the other state may find that few or none of the broadcast station signals they must carry are from their own state.

At the same time, under the Satellite Home Viewer Improvement Act ("SHVIA") of 1999,³ when providing local service, a satellite system may offer a subscriber only the signals of those local broadcast stations located within the same DMA as the subscriber; it is prohibited from providing any other local broadcast

¹ 47 U.S.C. § 534. Each cable system also is required to carry the signals of certain qualified local low power television stations (47 U.S.C. § 534) and certain qualified local noncommercial television stations (47 U.S.C. § 535). Low power television ("LPTV") service was created in 1982 to provide opportunities for locally-oriented television service in small communities. These communities may be in rural areas or may be individual communities within larger urban areas. LPTV stations are not considered "full-service" stations and have "secondary spectrum priority" to full-service stations. This means LPTV stations must not cause interference to the reception of existing or future full-service television stations, must accept interference from full-service stations, and must yield to new full-service stations, where interference occurs. LPTV stations are limited to an effective radiated power of 3 kilowatts (VHF) and 150 kilowatts (UHF).

² Nielsen Media Research identifies television stations whose broadcast signals reach a specific area and attract the most viewers. According to Nielsen, "a DMA consists of all counties whose largest viewing share is given to stations of that same market area. Non-overlapping DMAs cover the entire continental United States, Hawaii, and parts of Alaska. There are currently 210 DMAs throughout the U.S." (www.nielsenmedia.com/FAQ/dma_satellite%20service.htm, viewed on 9/16/2004). A very small number of counties are divided between two DMAs, typically because topographical features, such as mountains, split the viewing patterns within the county. In addition, there are several very sparsely populated portions of Alaska that are not part of any county and not included in any DMA.

³ SHVIA is Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, included by cross reference in the FY2000 Consolidated Appropriations Act, P.L. 106-113.

signals.⁴ As a result, in many situations, those subscribers to satellite service who are located in DMAs in which all the broadcast television stations are in another state (typically because the primary city in the DMA is in another state) cannot be provided the signals of any in-state local broadcast television stations.⁵

Table 1, which is appended to this report, presents a compilation of data from Nielsen Media Research⁶ and *Television & Cable Factbook 2004*⁷ on the number and location of U.S. television households that are located in DMAs for which the primary city is in a different state. It identifies, for each state:

- the number of television households in the state;
- the counties in the state assigned to DMAs for which the primary city is outside the state;
- the number of television households in those counties;
- the percentage of television households in the state that are located in DMAs for which the primary city is outside the state; and
- the full power broadcast television stations with city of license or transmitting location inside the state that are located in DMAs for which the primary city is outside the state.

These data provide the empirical basis for the discussion in this report. The information on city of license in Table 1 is very important. It shows whether television households in counties assigned to DMAs for which the primary city is outside the state nonetheless have in-state, in-DMA television stations available to them.⁸ For example, it shows that the approximately 55,000 Arkansas television

⁴ There has been some question about how Nielsen defines the borders of DMAs in those situations where a postal zip code crosses county borders. This has been of some concern because when the two major satellite operators have made decisions on which local stations they are allowed to provide subscribers, one has made its decisions according to strict county lines and the other according to zip codes.

⁵ Under another provision of SHVIA, subscribers who are not able to receive an over the air broadcast signal of acceptable quality using a conventional, stationary rooftop antenna are eligible to receive distant television signals from their satellite provider. Under certain circumstances, these distant signals may be from stations located in the same state as the subscriber. This situation is discussed in greater detail later in this report.

⁶ Nielsen Media Research, *U.S. Television Household Estimates*, September 2003, which presents data on the number of television households in each county and the DMA to which each county is assigned.

⁷ Warren Communications News, *Television & Cable Factbook 2004*, which presents data on the city of license and DMA of each commercial broadcast television station and the transmitting location of each noncommercial broadcast television station.

⁸ The *Television & Cable Factbook 2004* was published in April 2004 and thus does not include stations that have begun operation in 2004. As explained later in this report, the
(continued...)

households that are located in the Springfield, Missouri DMA receive service from two UHF analog⁹ stations in their DMA that have city of license in Arkansas and that therefore have the obligation to meet the needs and interests of Arkansas viewers. But approximately 77,000 Arkansas households that are located in the Memphis, Tennessee DMA have access to no broadcast television stations that have city of license in Arkansas (and thus have no access to broadcast television stations that have an obligation to serve the needs and interests of those Arkansas households). What **Table 1** does not provide is information about whether and how well the needs and interests of these television households are being met by broadcast television stations with city of license in the other state (for example, how well the broadcast stations with city of license in Memphis, Tennessee are serving the needs and interests of those 77,000 television households in Arkansas).

Broadcast Television

Localism has long been one of the three primary objectives of U.S. broadcast policy.¹⁰ Broadcasters are considered to be temporary trustees of the public's spectrum because the 1934 Communications Act instructs the Federal Communications Commission ("FCC" or "Commission") to award licenses to use the airwaves expressly on the condition that licensees serve the public interest;¹¹ section 309(a) requires the Commission to determine, in the case of applications for licenses, "whether the public interest, convenience, and necessity will be served by granting such application."¹² As trustees of the public airwaves, broadcasters must serve the public interest by airing programming that is responsive to the interests and

⁸ (...continued)

industry currently is in the midst of a congressionally-mandated transition from the analog transmission of broadcast signals to digital transmission. While most licensees had already begun transmitting digital as well as analog signals prior to 2004, many licensees began dual transmission in 2004 and those new digital transmissions are not reflected in the data (and hence not reflected in Table 1). Since most digital transmissions have simply duplicated analog transmissions, however, this should not result in an underestimate of the amount of programming available to television households.

⁹ Analog broadcast television service is provided over two portions of the radio spectrum – the very high frequency (VHF) portion and the ultra high frequency (UHF) portion. The transmission characteristics of the spectrum is such that VHF signals transmit further and require less power and therefore VHF stations tend to have a larger reach, with better reception quality and lower costs. These differences disappear when the signals are received via cable or satellite service rather than over the air.

¹⁰ The other two are diversity of voices and competition.

¹¹ The source for this discussion of broadcasters' public interest obligations is the introduction to the FCC's recent Notice of Inquiry, *In the Matter of Broadcast Localism*, MB Docket No. 04-233, adopted June 7, 2004 and released July 1, 2004, ¶¶ 1-5. Initial comments are due on November 1, 2004.

¹² 47 U.S.C. § 309(a). This concept of public trusteeship was reiterated by the Commission in *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12829 (1977), in which it noted that even as they transition to digital technology, "broadcasters will remain trustees of the public's airwaves."

needs of their community of license. The concept of localism derives from Title III of the Communications Act; section 307(b) of the act explicitly requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."¹³

In carrying out the mandate of Section 307(b), when the Commission allocates channels for a new broadcast service, its first priority is to provide general service to an area, but its next priority is for facilities to provide the first local service to a community.¹⁴ The Commission has long recognized that "every community of appreciable size has a presumptive need for its own transmission service."¹⁵ The Supreme Court has stated that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece."¹⁶

Once awarded a license, a broadcast station must place a specified signal contour over its community of license to ensure that local residents receive service.¹⁷ A station must maintain its main studio in or near its community of license to facilitate interaction between the station and the members of the local community it is licensed to serve.¹⁸ In addition, a station "must equip the main studio with production and transmission facilities that meet the applicable standards, maintain continuous program transmission capability, and maintain a meaningful management and staff presence."¹⁹ The main studio also must house a public inspection file, the contents of which must include "a list of programs that provided the station's most significant treatment of community issues during the preceding three month period."²⁰

In practice, full power broadcast television signal contours almost always extend far beyond the borders of the community (city) of license. For a full power television station, the geographic boundaries of its city of license are narrower than the geographic area that can receive the signals of the station. As shown in Figure 1,

¹³ 47 U.S.C. § 307(b).

¹⁴ See *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148, 167 (1952). The Commission's first television allocation priority is to "provide at least one television station to all parts of the United States"; its second is to "provide each community with at least one television broadcast station."

¹⁵ *Pacific Broadcasting of Missouri LLC*, 18 FCC Rcd 2291 (2003) (quoting *Public Service Broadcasting of West Jordan, Inc.*, 97 F.C.C. 2d 960, 962 (Rev. Bd. 1984)).

¹⁶ *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955).

¹⁷ 47 C.F.R. § 73.685(a).

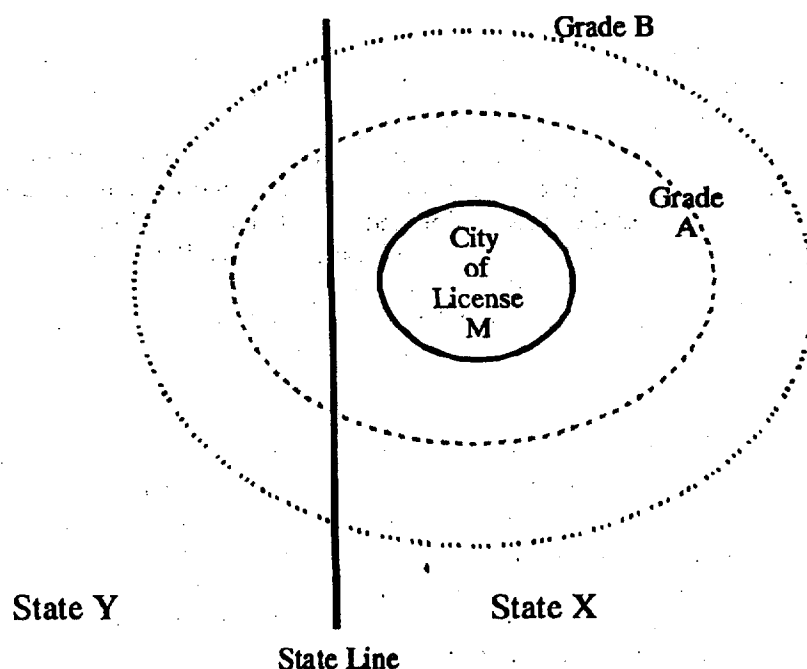
¹⁸ 47 C.F.R. § 73.1125.

¹⁹ *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, 3 FCC Rcd 5024, 5026 ¶ 24 (1988).

²⁰ 47 C.F.R. § 73.352(e)(11)(i). These lists must be retained until final action has been taken on the station's renewal application.

the Grade B contour for a hypothetical full power broadcast television station licensed to serve major city M, in state X, extends far beyond the borders of that city, and even into state Y.²¹

Figure 1. Broadcast Television Station City of License and Signal Reach



Source: CRS

Under existing FCC rules, the licensee's explicit public interest obligation is limited to serving the needs of viewers within its city of license.²² Over the years, the Commission has interpreted its rules to carry a secondary obligation for the licensee to serve the needs of viewers outside the city of license but within the signal reach.²³

²¹ The Grade A contour around a station's transmitter identifies the geographic area in which satisfactory service is expected at least 90% of the time for at least 70% of the receiving locations. The Grade B contour identifies the geographic area in which the quality of picture is expected to be satisfactory to the median observer at least 90% of the time for at least 50% of the receiving locations within the contours, in the absence of interfering co-channel and adjacent-channel signals. (See Warren Communications News, *Television & Cable Factbook 2004*, volume 72, at p. A-14.)

²² See Notice of Inquiry, *In the Matter of Broadcast Localism*, MB Docket No. 04-233, adopted June 7, 2004 and released July 1, 2004, at ¶ 3 and footnote 11.

²³ For example, in *Re Application of WHYY, Inc., for Renewal of License for Noncommercial Educational Television Station WHYY-TV, Wilmington Delaware*, the Commission stated "Although the petitioners emphasize the station's primary obligation to serve the needs of Wilmington, its city of license, WHYY-TV owes a secondary duty to serve other nearby areas, which include Philadelphia and Camden and Trenton, New Jersey, as we have previously recognized. 18 RR 2d 1603 (1970)." 53 F.C.C. 2d 421 (para. 9). In a subsequent decision involving the same station, the Commission expanded on this: (continued...)

But the FCC rules do not provide specific guidance about this secondary obligation. Yet, in many cases, the population residing within the city of license is only a small proportion of the total population receiving the station's signal.

Many broadcast television stations have viewing areas that cross state borders. This is not surprising as cities often are located along rivers or other natural boundaries that act as state borders, but urban development occurs on both sides of the border and a station's viewing radius around a central city will extend into suburbs and even other cities across state borders. In many of these situations, the FCC has attempted to serve populations on both sides of the state borders by assigning some licenses to cities in each state. For example, in the Paducah, Kentucky-Cape Girardeau, Missouri-Mount Vernon, Illinois area, an NBC-affiliated VHF analog and digital station and a UHF analog and digital station have city of license in Paducah, Kentucky, a Fox-affiliated UHF analog and digital station and the CBS-affiliated VHF analog and digital station have city of license in Cape Girardeau, Missouri, an ABC-affiliated VHF analog and digital station has city of license in Harrisburg, Illinois, and a VHF analog station has city of license in Mount Vernon, Illinois.

But some metropolitan areas are dominated by a single large city, with most of the television licenses (including those for all the stations affiliated with the four major broadcast networks) assigned to that city and the licenses for only a few stations assigned to cities in the neighboring state(s). For example, the licenses for the preponderance of stations serving the metropolitan New York City and Philadelphia areas are assigned to those cities, with very few licenses assigned to New Jersey, western Connecticut, or Delaware. The FCC has taken special notice of this situation with respect to the state of New Jersey by explicitly stating that all the New York and Philadelphia stations have the responsibility to serve the needs of their New Jersey viewers.²⁴

²³ (...continued)

"Although WHYY believes that it is a television station licensed to serve Wilmington and '[a]lmost equally important ... adjacent metropolitan areas of Philadelphia and Camden,' the licensee's first and primary obligation is to serve the local needs and interests of community of license - Wilmington. This primary obligation to Wilmington, contrary to WHYY's assertions, has been emphasized by the Commission for at least the last twenty-three years.... While regional programs can address the interests of Wilmington residents, such programs cannot serve other service area residents to the detriment of the citizens of Wilmington. The licensee's prime and most important focus must be on the problems, needs, and interests of its community of license. However, as we outlined in our 1975 decision to renew the license of WHYY, 53 FCC 2d 421 (1975), while the station's primary obligation is to serve the needs of its city of license, WHYY also has a *secondary* duty to serve other nearby areas including Philadelphia, Camden, and Trenton, New Jersey." 93 F.C.C. 2d 1096 (para. 20) (1983), emphasis in original.

²⁴ In an order reallocating channel 9 from New York City to Secaucus, New Jersey, (Channel 9 Reallocation (WOR-TV), 53 RR 2d 469 (1983)), the Commission stated: "It is expected that the licensee will devote itself to meeting the special needs of its new community (and the needs of the northern New Jersey area in general).... In the usual case, Secaucus, the city of assignment, would be the primary focus of the licensee's programming responsibilities. However, we have previously determined that the lack of local VHF (continued...)"

As a result of television viewing areas extending beyond state borders, and the frequency of populations being concentrated along both sides of those borders, there are a number of situations in which, despite the efforts of the FCC, a significant proportion of the television households in a state are served primarily or entirely by broadcast television stations whose city of license – and hence primary service obligation – lies outside that state.²⁵

There are 3,149,060 television households in New Jersey, but the vast majority of these households receive all or most of their over-the-air signals from stations licensed to New York City or Philadelphia. Only one television station with a city of license in New Jersey is affiliated with one of the major television networks, and that UHF analog NBC-affiliate serves the relatively sparsely populated southern tip of the state. Of the other eight commercial stations with city of license in New Jersey, only one is a VHF station and five are affiliated with Spanish language networks. Four of the New Jersey stations transmit from locations in New York City and their signals fully cover that city; they are listed under New York State in the *Television & Cable Factbook 2004*, a data source widely used in the industry, despite having city of license in New Jersey. As indicated earlier, at least at the policy level, the Commission has attempted to address the potential lack of coverage of New Jersey-specific issues by explicitly requiring the stations licensed to New York City and Philadelphia to offer programming that serves the New Jersey households within their viewing areas.

There are 313,630 television households in Delaware, but there is only one UHF analog commercial station with city of license in the state, plus three UHF noncommercial stations. The bulk of the Delaware population is served by television stations in Philadelphia; those stations have primary obligations to serve the viewers of Philadelphia and suburban New Jersey. The remainder of the Delaware viewers are served by stations in Salisbury, Maryland. Similarly, the only major network with an affiliate in New Hampshire is ABC. The vast majority of New Hampshire's 498,150 television households receive broadcast service primarily from stations in Boston.

This pattern exists around many large cities. More than 900,000 television households in Maryland are in the Washington, DC DMA. Although a small portion of these households are served by a UHF analog and digital ABC-affiliated station and a UHF analog independent station, both with city of license in Hagerstown, Maryland, and a UHF analog noncommercial station with city of license in Frederick, Maryland, most are primarily served by Washington, DC stations. The Baltimore

²⁴ (...continued)

television service to this highly populated area of northern New Jersey presented a unique set of circumstances (See, e.g., Docket No. 20350, 2nd R&O, 59 FCC 2d 1386 [37 RR 2d 1275] (1976), wherein special service obligations have been imposed on all New York City and Philadelphia TV stations. Accordingly, we expect RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee. At renewal time RKO will be judged by how it met the obligation to serve the greater service needs of northern New Jersey, which we view as broader than the specific needs of Secaucus.”

²⁵ The data underlying the following discussion are found in Table 1.

stations provide a potential source of programming that addresses Maryland-specific issues, but although most of these households fall within those stations' Grade B contours, most households subscribe to cable or satellite service and therefore few of them have the antennas needed to bring in the Baltimore stations.²⁶ While Washington, DC stations do address issues of interest to Maryland suburbanites, they have the burden of addressing the needs of three jurisdictions, with primary obligations to serve DC. In Virginia, as well, more than 900,000 television households are in the Washington, DC DMA, and are served primarily by Washington, DC stations, with only a UHF analog and digital independent station, a UHF analog Telefutura-affiliated station, a UHF analog and digital noncommercial station, and two UHF analog noncommercial stations located in that portion of Virginia.

More than 300,000 Kansas television households are in the Kansas City, Missouri DMA and rely almost entirely on broadcast stations from that city. The only station in that DMA with city of license in Kansas is a UHF analog and digital station in Lawrence, Kansas. The Kansas City stations do not have explicit obligations to meet the needs of their Kansas viewers. Similarly, more than 330,000 – or just under 35% – of the television households in Connecticut are in the New York City DMA and primarily served by New York City stations; more than 150,000 Kentucky television households are in the Cincinnati, Ohio DMA and there are no commercial stations in that DMA with city of license in Kentucky; almost 200,000 television households in northwestern Indiana are in the Chicago, Illinois DMA, served primarily by Chicago stations, with only one UHF analog and digital commercial station and one UHF analog noncommercial station located in that part of Indiana; and more than 300,000 television households in western Illinois are in the St. Louis, Missouri DMA, served primarily by St. Louis stations, with only one UHF analog and digital commercial station with city of license in Illinois.

This problem is not limited to major metropolitan areas. As shown in Table 1, 54.55% of the television households in Wyoming are located in television markets outside the state. The population centers around Casper and Cheyenne are served by broadcast stations with city of license in Wyoming, but most other parts of the state are served primarily or entirely by broadcast stations with city of license outside the state. Almost one-fourth of Idaho's television households are in DMAs outside the state and more than one-fifth of Arkansas' television households are in DMAs outside the state.

²⁶ Today, upwards of 90% of all U.S. television households receive their broadcast signals by a means other than over the air reception. According to data presented by the National Cable and Telecommunications Association on its website (www.ncta.com, Statistics and Resources, viewed on 9/8/2004), in early 2004 there were 108.4 million U.S. television households, of which 73.6 million subscribed to cable television and 24.9 million subscribed to satellite television or some other non-cable multichannel video program service. (Adding these two figures together would create a slight amount of double counting of non-broadcast households as a small portion of these households subscribed to both cable and a non-cable service). The statutory, regulatory, and private contractual restrictions on cable and satellite systems carrying the signals of broadcast stations located in-state, but outside-the-DMA are discussed in the cable and satellite sections of this report.

Cable Television

As early as the 1960s, when households began receiving their broadcast signals over cable television rather than over the air, Congress became concerned both that local broadcasters could be harmed (either because they were not compensated for their programming or because local cable systems chose not to carry their programming, thus cutting off their access to a large segment of the viewing audience) and that there could be a diminution of programming that serves local needs and interests. Congress therefore enacted several laws intended to extend the policy goal of localism to the cable television industry, including the 1972, 1984, and 1992 Cable Acts.

"Must Carry" Rules

Most notable was the adoption of the "retransmission consent/must carry" election in the 1992 Cable Act. Every three years, each local commercial broadcast television station must choose between:

- negotiating retransmission consent agreements with the cable systems operating in its service area, whereby if agreement is reached the broadcaster is compensated by the cable system for the right to carry the broadcast signal, and if agreement is not reached, the cable system is not allowed to carry the signal; or
- requiring each cable system operating in its service area to carry its signal, but receiving no compensation for such carriage.

With this mandatory election, broadcasters with popular programming that are confident the local cable systems will want to carry that programming can make the retransmission consent election and be assured compensation for such carriage, and broadcasters with less popular programming that the local cable systems might otherwise not choose to carry can make the must carry election and be assured that their signal will be carried by all local cable systems.

The evolution of the must carry rules demonstrates the difficulty of constructing rules that safeguard local broadcasters and foster local programming without unduly burdening cable operators or undermining the exclusive distribution contracts between program content providers and program distributors. The initial rules required cable operators to carry all broadcast television signals whose Grade B signals reached into the cable service area. But this proved too expansive; for example, the Grade B contours of Washington, DC stations extend over Baltimore, and vice versa. The must carry requirements were then scaled back to those signals from stations located within certain mileage limits (for example, within 35 miles). There then was some concern that this would harm broadcast stations that did not meet these mileage limits but had historically been viewed by audiences beyond those mileage limits. The must carry rules were modified to apply to all broadcast stations that were "significantly viewed" by those households in the cable service

area that did not receive service from cable or satellite providers.²⁷ The specific threshold viewing levels were, for a network-affiliate station, a market share of at least 3% of total weekly viewing hours in the market and a net weekly circulation of 25%; for independent stations, 2% of total weekly viewing hours and a net weekly circulation of 5%. The share of viewing hours referred to the total hours that households that do not receive television signals from multichannel video program distributors ("MVPDs")²⁸ viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the week. Net weekly circulation referred to the number of households that do not receive television signals from multichannel video programming distributors that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total households that do not receive television signals from multichannel video programming distributors in the survey area.

But as more and more households subscribed to cable service, it became less reasonable to base must carry decisions on the behavior of the minority of households that continued to get their service over the air. In the 1992 Cable Act, Congress modified sections 614 and 615 of the 1934 Communications Act²⁹ to base the must carry rules on a definition of local television markets explicitly based on viewing patterns, requiring each cable operator to carry the signals of local commercial television stations, qualified low power stations, and qualified noncommercial educational stations, if the licensees of those stations chose to have their signals carried.³⁰ This statutory language remains in place today.

The exact number of broadcast signals that cable systems must carry varies with the size of the cable system, but includes at a minimum three local commercial stations and one local noncommercial educational station. Cable systems with more than 12 channels must carry local commercial broadcast stations on up to one-third of their channels and up to three qualified noncommercial educational stations.

²⁷ *Cable Television Report and Order*, adopted on 2/2/72, 36 FCC 2nd 143 (1972).

²⁸ MVPDs provide packages of video programming to subscribers for a monthly fee. The overwhelming majority of television households that receive their programming from MVPDs subscribe to cable or direct broadcast satellite systems, but a small number of households get low power "C-band" home satellite dish ("HSD") service, wireless cable service such as multichannel multipoint distribution service ("MMDS"), or service provided by municipal or private overbuilding broadband service providers (BSP) or by private cable operators. See Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, adopted January 5, 2004, released January 28, 2004.

²⁹ Codified at 47 U.S.C. §§ 534 and 535.

³⁰ As explained above, each broadcast television station can choose, once every three years, between two options: (1) negotiating a retransmission consent agreement with each local cable operator to make its programming available in exchange for compensation or (2) requiring the local cable operator to carry its programming at no charge to the cable operator.

"Local" commercial stations are defined as all stations whose community of license is within the same television market as the cable system.³¹ Following the statutory directive to use television markets delineated by commercial publications, the FCC implemented a rule defining television markets according to the Nielsen DMAs.³²

Other Federal Rules and Laws

Cable systems must carry the entirety of the program schedule of every local television station carried pursuant to the mandatory carriage provisions (or the retransmission consent provisions) of the 1992 Cable Act, subject to the carriage restrictions in the network program non-duplication rules,³³ syndicated exclusivity protection rules,³⁴ and sports programming blackout rules.³⁵ In practice, these rules

³¹ A noncommercial educational station that places a Grade B signal over a cable system's principal headend, or whose city of license is within fifty miles of the cable system's principal headend, is considered "local" for this purpose.

³² FCC Fact Sheet, "Cable Television," section entitled "Signal Carriage Requirements," dated June 2000, available at [<http://www.fcc.gov/mb/facts/csgen.html>], viewed on 9/15/2004. Television markets originally were defined according to Arbitron market definitions, but when Arbitron discontinued performing this service, the FCC chose to use the Nielsen DMAs.

³³ Commercial television station licensees are entitled to protect the network programming they have contracted for by exercising non-duplication rights against more distant television broadcast stations carried on a local cable television system that serves more than 1,000 subscribers. Commercial broadcast stations may assert these non-duplication rights regardless of whether or not their signals are being transmitted by the local cable system and regardless of when, or if, the network programming is scheduled to be broadcast. Generally, the zone of protection for such programming cannot exceed 35 miles for stations licensed to a community in the Commission's list of top 100 television markets or 55 miles for stations licensed to communities in smaller television markets. In addition, a cable operator does not have to delete the network programming of any station which the Commission has previously recognized as significantly viewed in the cable community.

³⁴ With respect to non-network programming, cable systems that serve at least 1,000 subscribers may be required, upon proper notification, to provide syndicated protection to broadcasters who have contracted with program suppliers for exclusive exhibition rights to certain programs within specific geographic areas, whether or not the cable system affected is carrying the station requesting this protection. However, no cable system is required to delete a program broadcast by a station that either is significantly viewed or places a Grade B or better contour over the community of the cable system.

³⁵ A cable system located within 35 miles of the city of license of a broadcast station where a sporting event is taking place may not carry the live television broadcast of the sporting event on its system if the event is not available live on a local television broadcast station, if the holder of the broadcast rights to the event, or its agent, requests such a blackout. The holder of the rights is responsible for notifying the cable operator of its request for program deletion at least the Monday preceding the calendar week during which the deletion is desired. If no television broadcast station is licensed to the community in which the sports event is taking place, the 35-mile blackout zone extends from the broadcast station's licensed community with which the sports event or team is identified. If the event or local team is not identified with any particular community (for instance, the New England

(continued...)

are quite complex and result in significant amounts of programming from television stations within a cable operator's DMA not being carried because such carriage would be duplicative or would contravene exclusivity agreements.

Interestingly, while the must carry rules are now based on DMAs, the non-duplication rules continue to be based on the old "significantly viewed" criteria. Consider a cable operator that sought to carry the broadcast signals of a network-affiliated station that is located nearby, but outside the DMA in which the cable system is located, and that successfully worked out a retransmission consent agreement with that affiliated station. For example, assume a Montgomery County, Maryland, cable operator, which is located in the Washington, DC DMA, sought to carry a Baltimore broadcast station, and successfully worked out a retransmission consent agreement with the Baltimore station. Then, if that Baltimore station met the "significantly viewed" criteria in the cable operator's location, its signals would not be subject to the non-duplication rules and the signals from both the Washington, DC network affiliate and the Baltimore network affiliate could be carried by the Montgomery County cable operator in their entirety, without blackouts of the network programming on the Baltimore station. Some industry observers claim, however, that such duplication does not occur very often because the national networks, rather than the affiliated stations, tend to make the determination (through language in the private contractual agreement between the network and each affiliate) about whether a station located outside a cable system's DMA should grant the cable system retransmission consent – and frequently these contracts effectively preclude retransmission consent.

Copyright law also may tend to restrain cable systems from carrying the signals of broadcast stations located outside the DMA in which the cable system is located.³⁶ Cable systems are required to pay royalties under a congressionally granted compulsory copyright license for the "secondary transmission" of the signals of broadcasters located outside the DMA within which the cable system is located. In contrast, cable systems enjoy a royalty-free permanent compulsory copyright license – that is, do not have to pay copyright fees – for the secondary transmission of broadcast signals of stations located in their DMAs. There is an exception to the copyright fee requirement. The royalty-free license extends to the secondary transmission of signals of out-of-DMA broadcast stations that meet the "significantly viewed" criteria discussed above. However, if an in-state, but out-of-DMA station does not meet the "significantly viewed" criteria, the requirement to pay the copyright royalties might tip the balance away from the cable system carrying the station's signals.

³⁵ (...continued)

Patriots), the 35-mile blackout zone extends from the community nearest the sports event which has a licensed broadcast station. The sports blackout rule does not apply to cable television systems serving less than 1,000 subscribers, nor does it require deletion of a sports event on a broadcast station's signal that was carried by a cable system prior to March 31, 1972. The rule does not apply to sports programming carried on non-broadcast program distribution services such as ESPN. These services, however, may be subject to private contractual blackout restrictions.

³⁶ 17 U.S.C. § 111.

Flexibility in the Rules

The 1992 Cable Act includes explicit language authorizing the FCC to implement the must carry rules flexibly in order to foster the goal of localism. The language in Section 614(h)(1)(C) of the act (Carriage of Local Commercial Signals)³⁷ explicitly allows for exceptions, requiring the carriage of "local commercial television stations," but providing flexibility on how those local stations would be determined:

(i) For purposes of this section, a broadcasting station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purpose of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

(ii) In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as—

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

In a 2001 decision involving the attorney general of the state of Connecticut, the Commission found that only a broadcaster or a cable system has the standing to file a request to modify the signal carriage right of a broadcast station.³⁸

The Digital Transition and Local Programming

The television industry is in the midst of another policy debate involving cable carriage of local broadcast signals during the congressionally mandated transition from analog transmission of broadcast signals to digital transmission.³⁹ During the transition, television broadcasters have been given additional spectrum to allow them

³⁷ Codified at 47 U.S.C. § 534.

³⁸ 16 FCC Rcd 16099 (2001).

³⁹ For a full discussion of this transition, see Lennard Kruger, *Digital Television: An Overview*, CRS Report for Congress RL31260.

to broadcast using digital technology while retaining the spectrum they use for analog broadcasting. Eventually the broadcasters will be required to return the spectrum used for analog transmission. During this transition, many broadcasters are providing both analog and digital broadcast signals. Therefore there has been a public policy debate over which broadcast signals cable systems should be obligated to carry. In January 2001, the FCC announced adoption of rules for cable carriage of digital television signals. The FCC ruling does not require cable systems to simultaneously carry both the analog and digital signals ("dual carriage") of local television stations. The FCC tentatively concluded that "such a requirement appears to burden cable operators' First Amendment interests more than is necessary to further a substantial governmental interest." The Commission also adopted a Further Notice of Proposed Rulemaking ("FNPRM") to continue to collect public comment and investigate this issue. While not approving a dual carriage mandate, the FCC did rule that a digital-only television station, whether commercial or non-commercial, can immediately assert its right to carriage on a local cable system. In addition, a television station that returns its analog spectrum and converts to digital operations must be carried by local cable systems. Cable systems must carry "primary video," defined as a "single programming stream and other program-related content." The FNPRM will define the scope of "program-related content." With digital technology, broadcasters can divide their 6 MHz of spectrum into separate and discrete streams of content and broadcast multiple channels of programming. This is known as "multi-casting." Broadcasters have formally sought reconsideration of the Commission's must carry rules as they relate to digital television and multicasting; the Commission has not yet issued a reconsideration order.

Local Franchise Requirements

Under the 1984 Cable Act, local franchising authorities may require cable operators to set aside channels for public, educational, or governmental ("PEG") use.⁴⁰ In addition, franchising authorities may require cable operators to provide services, facilities, and equipment for the use of these channels. Many cable systems include several PEG channels. In general, cable operators are not permitted to control the content of programming on PEG channels. Cable operators may impose non-content-based requirements, such as minimum production standards, and may mandate equipment user training. In addition, cable systems may make available "access channels" that typically provide community-oriented programming, such as local news, public announcements and government meetings. They are usually programmed by individuals or groups, on either public, educational or governmental access channels or on commercial leased access channels.

Summary of Factors Affecting Local Programming on Cable

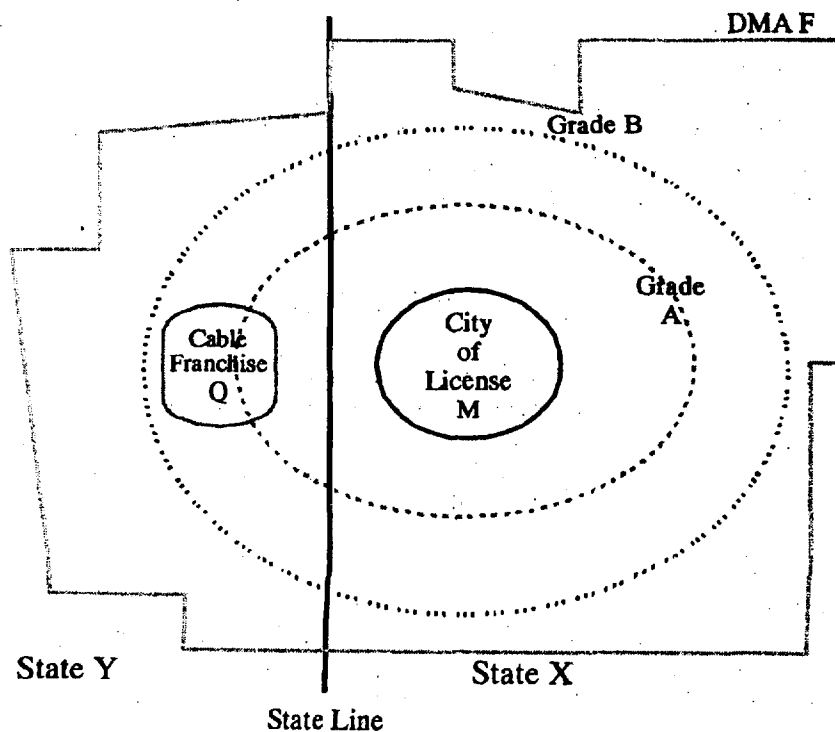
The bottom line of the existing rules is as follows. Unless they have systems with very small capacity, local cable operators are required to carry the broadcast signals of all the full-power television stations (and certain qualified low power television stations) located in their DMA and non-commercial stations that transmit from within 50 miles of the cable head-end whose grade B contours cover the cable

⁴⁰ P.L. 98-549, 47 U.S.C. 531 (Section 611 of the Communications Act).

system's service area. The cable operator is required to carry the entirety of the program schedule of each of these broadcast stations (subject to possible blackouts to conform with the non-duplication rules for those circumstances where more the broadcast programming is duplicated by a second or third station in the DMA).

If a cable system is located in a DMA in which the primary city is in another state, and most or all of the television stations in that DMA have city of license in the other state, then the broadcast television signals it must carry will be primarily or entirely from out of state. This scenario is shown in **Figure 2**. Although local cable operator Q's franchise is located in state Y, and the major nearby city, M, is located in state X, both are within the same DMA, F. If local cable operator Q wants to carry the signals of broadcasters that are located in state Y but outside of DMA F, it can negotiate with those broadcasters to carry their signals, but any carriage would be subject to the restrictions in the network program non-duplication, syndicated programming exclusivity protection, and sports programming blackout rules, and to copyright fees (though these rules and fees will not be in effect if the "significantly viewed" criteria can be met). All these factors may restrict the state-specific entertainment programming cable operator Q can carry and also could affect the local news programming carried. Cable operator Q is not likely to use one of its channels to offer a "Swiss cheese" program schedule with holes in it for blacked out programs or programs for which it does not choose to pay copyright fees. Nor is it likely to set aside a channel just for several hours a day of state news or one or two sports events per week.

Figure 2. A Cable System Located in a DMA in Which the Primary City is in Another State.



Source: CRS.

Some observers claim, however, that when cable operators do not carry the in-state programming of out-of-DMA broadcast signals, it is unlikely to be because of these rules, which frequently can be sidestepped through application of the exceptions for "significantly viewed" stations. Rather, these observers claim, it is likely to be because the in-state broadcasters are constrained by territorial exclusivity provisions in their network affiliation agreements, allegedly imposed by the broadcast networks.

Whatever the cause of cable system reluctance to carry the signals of in-state, but outside-the-DMA broadcast signals, it is likely that the within-DMA, but out-of-state broadcasters (for example, the broadcasters with city of license M) will cover some issues of interest to the cable operator's subscribers (the subscribers to cable system Q). Their inclusion in the same DMA is based on the assumption that viewers in the county in which the cable system operates tend to view the signals from that DMA and are likely to have a marketplace connection that broadcasters will have an incentive to foster. But the coverage of issues specific to the viewers in that cable system's service area may be quite limited since the broadcasters are not subject to any explicit obligation to serve the needs of viewers outside their city of license and their close-in viewers are likely to be considered more valuable by advertisers.

Whether or not this represents a problem to the cable system's subscribers will depend on their relative affinity toward news, information, and sports programming focused on the television market in which they are located, as defined by the DMA, vs. news, information, and sports programming focused on the political jurisdiction (state) in which they reside. For example, a cable subscriber in Montgomery County, Maryland, might have a preference for programming from Washington, DC stations that presents detailed traffic information on commuter routes between the subscriber's home and downtown Washington or, alternatively, might have a preference for programming from Baltimore, Maryland stations that presents more in-depth reporting of Maryland state politics. The current rules assume the preference is for the former because it is based on the statutory requirement that must carry requirements mirror existing viewing patterns.

Satellite Television

The Satellite Home Viewer Improvement Act ("SHVIA") of 1999⁴¹ sought to promote competition between cable television and direct broadcast satellite, and to increase local program choices available to television households, by allowing satellite companies to provide local broadcast television signals to all subscribers who reside in the local television station's market. Previously, they were not

⁴¹ SHVIA is Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, included by cross reference in the FY2000 Consolidated Appropriations Act, P.L. 106-113. For more information on SHVIA and related issues, see Marcia S. Smith, *Satellite Television: Reauthorization of the Satellite Home Viewer Improvement Act (SHVIA) – Background and Key Issues*, CRS Report for Congress RS21768, and Marcia S. Smith, *Satellite Television: Provisions of SHVIA and LOCAL, and Related Issues*, CRS Report for Congress RS20425.

permitted to do so. Local markets are explicitly defined in the statute as the Nielsen DMAs. This ability of satellite companies to provide local broadcast channels is commonly referred to as "local-into-local" service. Satellite companies are not required to offer local-into-local service, and they can charge for the service. Under copyright law, satellite companies enjoy a royalty-free permanent compulsory copyright license – exempting them from paying copyright royalties – for the secondary transmission of the broadcast signals of stations provided to subscribers as part of local-into-local service (the signals of broadcast stations located in the DMA of the subscriber).⁴² But if they carry one or more local stations in any DMA, they must carry all television stations in the DMA that ask to be carried on the system. A satellite company is not required to carry more than one local broadcast television station that is affiliated with a particular television network unless the stations are licensed to communities in different states.⁴³

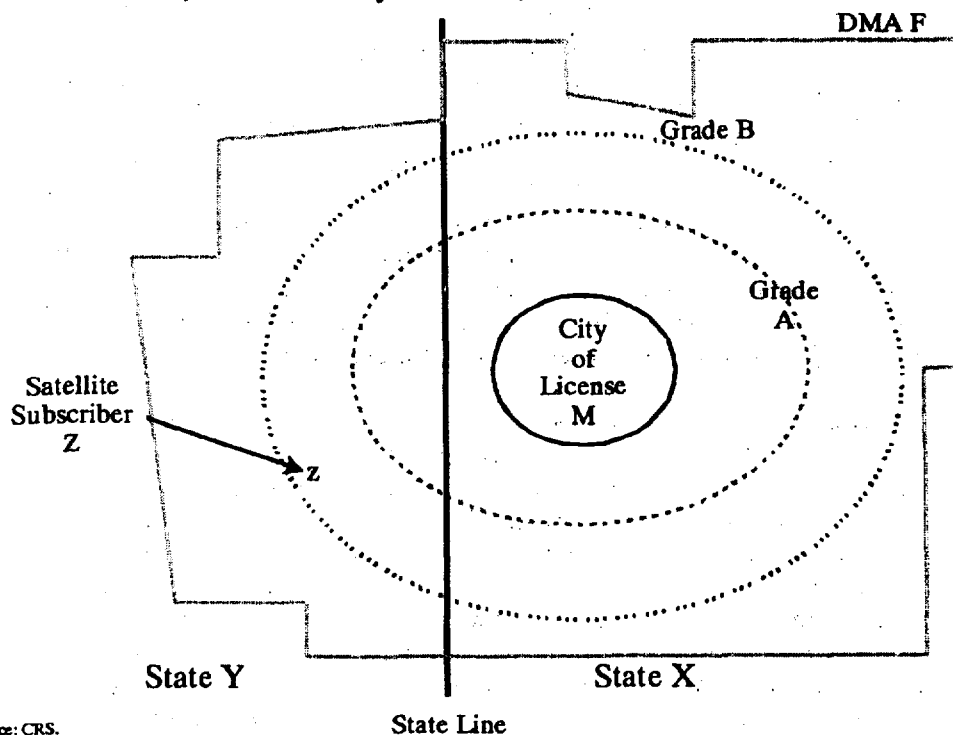
Local-into-local service is explicitly restricted by law to the provision of the signals of broadcast television stations with city of license within the DMA in which the customer is located. Satellite operators do not have the opportunity that cable operators have to negotiate carriage of the programming of broadcasters that are in-state, but outside the viewer's DMA, unless the satellite operator's customers are unable to receive over-the-air broadcast signals of a Grade B intensity and therefore qualify, under a different section of law,⁴⁴ to receive distant network signals that may be (but need not be) from within state. This situation is shown in Figure 3. Satellite subscriber Z is located in state Y and in DMA F. Under current law, the satellite operator may provide subscriber Z local-into-local service consisting only of the signals of broadcast television stations located in DMA F, even if none of those stations are located in state Y. Nor can the satellite operator offer subscriber Z any distant network signals that originate from state Y because subscriber Z is within the Grade B contour of the broadcast stations in city M. Because of these rules, news or sports entertainment that is broadcast by a station in central Wyoming or Arkansas often is not available to satellite subscribers in more remote parts of those states that are within out-of-state DMAs.

⁴² 17 U.S.C. 122.

⁴³ FCC Fact Sheet, "Satellite Home Viewer Improvement Act of 1999," dated December 2000, available at [<http://www.fcc.gov>] (under Media Bureau and MB Fact Sheet on Broadcast Signals on DBS), viewed on 10/07/2004.

⁴⁴ The "distant network signal" license originated in the 1988 Satellite Home Viewer Act and was extended in 1994 and in the 1999 SHVIA. See 17 U.S.C. 119.

Figure 3. Satellite Subscriber Whose Local Broadcast Television Stations, as Defined by the DMA, Are in a Different State



Source: CRS.

This restriction on local-into-local service is not based on technological constraints or lack of bandwidth (although the number of DMAs in which local-into-local service is offered may be affected by bandwidth and satellite capacity constraints). Once a satellite operator has uplinked the programming of a particular broadcast station to a satellite, there are no technical constraints on making that signal available to all television households within the footprint of the satellite. (It is true, however, that the greater use of spot beams has resulted in smaller footprints so there may now be situations in which the broadcast signal of a station in a particular state is uplinked to a satellite with a spot beam that does not cover other portions of the state that are located in a different DMA.) But in most cases, the primary reason why a subscriber does not receive broadcast signals from stations located outside that subscriber's DMA is that the satellite operator, in order to conform with the law, must set the subscriber's set-top box to exclude the out-of-DMA signals emanating from its satellite.

Several bills have been introduced in the 108th Congress that include provisions that would allow satellite systems to offer in-state, but out-of-DMA broadcast signals for local-into-local service. These bills are discussed in the Issues for Congress section of this report.

Issues for Congress

Localism remains one of the cornerstones of U.S. media policy. There are a small number of broadcast television stations relative to the number of local governmental jurisdictions. Moreover, every full power television station broadcasts signals that extend far beyond the borders of its city of license. Thus, when a particular station is assigned a city of license to serve, there will always be many nearby local jurisdictions that the licensee has no explicit or specific obligation to serve. Where the broadcast coverage area extends across governmental boundaries, and especially state borders, it is difficult for a broadcaster to fully address the needs of all jurisdictions. Broadcasters, of course, have the incentive to meet the needs and interests of as many of its potential viewers as possible. Most television broadcasters attempt to reconcile this by covering issues of general interest, such as crime and weather, and/or regional interest, such as transportation systems. However, some current statutory and regulatory requirements do not provide incentives, or even make it more difficult, for broadcast, cable, and satellite providers of television to meet the needs and interests of their communities. If Congress wants the FCC to systematically review its rules to eliminate any disincentives to localism or to clarify licensee obligations, it could pass legislation instructing the Commission to do so.

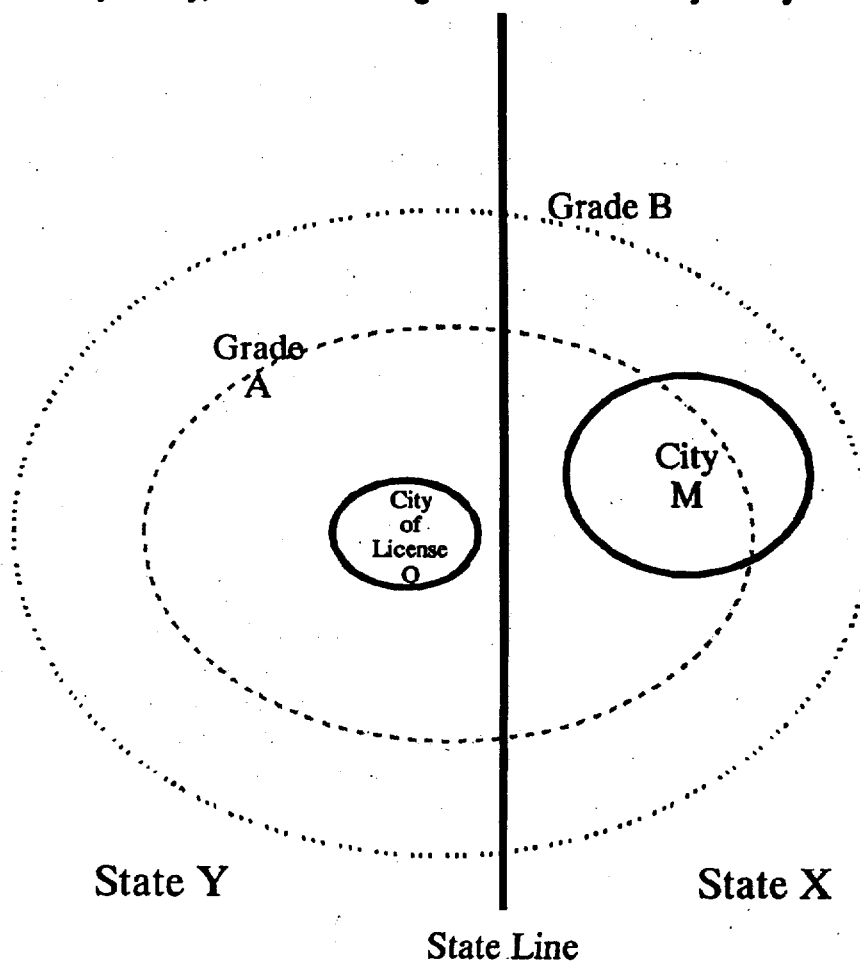
Broadcaster Obligations Within the City of License

As explained earlier, the FCC's first priority when it assigns licenses is to provide general service to an area, and its second priority is to provide the first local service to a community. Most broadcast television stations are attentive to the needs and interests of the viewers in their city of license. It is in their self-interest to be responsive to their viewers. Their market incentives may diverge from this goal, however, if their city of license is an outlying city to a much larger city and their signal covers the larger city.

As shown in Figure 4, the grade B contour of the station licensed to outlying city O fully covers major city M. In this situation, the licensee may have a stronger incentive to serve the needs and interests of the larger city. This incentive may be stronger yet if the city of license is in a different state than the larger city. For example, *Television & Cable Factbook 2004*, which presents data on each television station, by state and city, lists under a major city a number of stations that have as city of license an outlying city to that major city. In seven of these situations, by being listed under the nearby major city, they are listed under a different state than their city of license. These seven are as follows.

City of License	State Listing in <i>Factbook</i>	City Listing in <i>Factbook</i>
Newark, New Jersey	New York	New York-Newark
Linden, New Jersey	New York	New York-Newark
Paterson, New Jersey	New York	New York-Paterson
Secaucus, New Jersey	New York	New York-Secaucus
Thomasville, Georgia	Florida	Tallahassee, FL-Thomasville, GA
East St. Louis, Illinois	Missouri	St. Louis-East St. Louis
Superior, Wisconsin	Minnesota	Duluth-Superior, Wisconsin

Figure 4. Broadcast Station Whose City of License is an Outlying City to a Major City, but Whose Signal Covers the Major City



Source: CRS.